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In The
Supreme Court of the United States
October Term, 1983

STATE OF IDAHO,
Petitioner,
and
MEMBERSHIP OF HEYBURN STATE PARK LEASE-
HOLDERS ASSOCIATION,
Intervenor/Petitioner,
vs.
THE COEUR D' ALENE TRIBE OF INDIANS,
Intervenor/Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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Intervenor/Respondent, the Coeur d' Alene Tribe of Indians, hereinafter called "Tribe," herewith files its brief in opposition to the Petition of the State of Idaho for a Writ of Certiorari to review the Opinion of the Ninth Circuit dated December 1, 1983, No. 80-3013 which is set out in full as Exhibit I in Petitioner's Appendix¹ and reported at 710 F. 2d 1461 (9th Circuit, 1983).

¹Henceforth, all cites to Petitioner's Appendix will be "Appendix, p. ____".

TRIBE'S STATEMENT OF THE CASE

While the State's Statement of the Case is generally accurate, it contains several misstatements and oversights each of which advance the State's theory of the case. For example, on page 5 Petitioner states:

The Coeur d' Alene Tribe unanimously voted for the establishment of a park.

Petitioner implies that the Tribe "voted unanimously" in favor of the transfer of the Tribal land of Idaho and the establishment there of a State Park. Nothing could be further from the truth. There is not a scintilla of evidence in the record that the Tribe ever knew of the establishment of the state park much less consent to its establishment. There is some disputed evidence that a group of Tribal members meeting in 1907 with the Bureau of Indian Affairs Superintendent Samuel Worley, expressed a wish that a national park be established. There were Congressional bills introduced by Senator Heyburn to establish such a park. None of these bills contemplated the taking of Tribal title to the lands involved.

The Ninth Circuit in the decision appealed from covered this question as follows:

We find the legislative history, at best, to be "equivocal." See *Namen II*, 665 F2d at 956-57. First the Congressional Record shows that Senator Heyburn, author of the original bill, S. 8316, which eventually died in the House, never intended a State park to be established. Rather he tried to establish a national park. See 42 Cong. Rec. 3378 and 48 Cong. Rec. 8037-39. Similarly, it cannot be said that the Tribe ever consented to the taking of reservation land for a State park. (Emphasis added). Appendix, p. 13.

Petitioner also states at page 6 of the Petition:

The entire 6,774.64 acres were conveyed to the State of Idaho by Presidential patent of June 29, 1911, in exchange for payment of the appraised value of \$11,379.17

This is a misstatement because, again, there is no evidence in record of any appraisal having been made other than a horseback estimate of value by the Superintendent at the time a national park was being considered.

The Ninth Circuit Court in commenting on this stated as quoted above, "We find the legislative history, at best, to be 'equivocal,' on this point."

Petitioner states on page 7:

All parties and courts have agreed that this patent language creates a fee simple subject to a condition subsequent giving rise to a right of reentry.

That is Petitioner's interpretation of the title created.

The Ninth Circuit in its decision covers this point by saying:

The land was conveyed to the State by patent, which contained language requiring that the property be used solely for park purposes. The United States was given a reversionary interest and a right of reentry to the land if it were not maintained as a public park. Appendix, page 1.

The appeals court makes no reference to the State's quoted definition. The significance of the difference in wording is that by the State's terminology it claims that the United States would own no present interest in the right of reentry and its title to the reversion would come into being only after reentry is exercised. The terminology of the appeals court means that the

United States (and the Tribe as beneficial owner) has a present, continuing interest in the "reversionary interest." Also reserved were, in the words of the patent:

All valuable mineral deposits in said lands, together with the exclusive right to mine and remove the same, . . . ; and also the right to flood and overflow the said lands, and to permit, license, or authorize the same, for domestic, irrigation and power purposes. Appendix, p. 64.

The patent then conveys the land to Idaho:

Subject, however, to the terms, conditions, and reservations prescribed by the Secretary of the Interior as hereinabove set forth. Appendix, p. 65.

On page, 7, Petitioner states; "No Indian jurisdiction was ever exercised in the park after conveyance."

This statement is gratuitously made, never, to the knowledge of the writer, appearing before in the record of this case.

The Heyburn lands are all located within the exterior boundaries of the present Coeur d' Alene Reservation and are presumably subject to Tribal jurisdiction. Total state jurisdiction under Public Law 280 (18 USC §1162, 25 USC §1321) was never assumed by the State of Idaho. Rather, the state assumed partial jurisdiction over all the lands on the Reservation by Idaho Code 67-5101 through 67-5103.²

²67-5101. State jurisdiction for civil and criminal enforcement concerning certain matters arising in Indian country. The state of Idaho, in accordance with the provisions of 67 Statues at Large, page 589 (Public Law 280) hereby assumes and accepts jurisdiction for the civil and criminal enforcement of state laws and regulations concerning the following matters and purposes arising in Indian country located within this state, as Indian country is defined by title 18, United States Code 1151, and obligates and binds this state to the assumption thereof:

The Coeur d' Alene Tribe has an established court system and a comprehensive Law and Order Code and Constitution which extend Tribal jurisdiction to all lands within its Reservation's exterior boundaries.

Petitioner states on page 7:

The State of Idaho sought declaratory judgement in the United States District Court for the District of Idaho that the patent was not violated The United States filed a separate suit in the same Court seeking to exercise the right of reentry and quiet title to the property The suits were consolidated for trial and the Tribe and Leaseholders were granted limited leave to intervene

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- A. Compulsory school attendance
 - B. Juvenile delinquency and youth rehabilitation
 - C. Dependent, neglected and abused children
 - D. Insanities and mental illness
 - E. Public assistance
 - F. Domestic relations
 - G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof. (1963, ch. 58, § 1, p. 224.)

67-5102. Additional state jurisdiction with consent of Tribe governing body. . . Additional state jurisdiction in criminal and civil causes of action may be extended to particular reservations or Indian country with the consent of the governing body of the tribe occupying the Indian country effected (affected) by the assumption of such additional jurisdiction. This may be achieved by negotiation with the tribe or by unilateral action by the tribe. In every case the extent of such additional jurisdiction shall be determined by a resolution of the tribal governing body and become effective upon the tribe's transmittal of the resolution to the attorney general of the state of Idaho. Such resolution may effectively accept jurisdiction as to any particular field of criminal or civil jurisdiction. All state jurisdiction extended by virtue of this act shall be concurrent (and not exclusive) with jurisdiction in the same matters existing in the tribes or the federal government. (1963, ch. 58, § 2, p. 224.)

67-5103. . . Matters excepted from state jurisdiction. Nothing in this act shall authorize the alienation, encumbrance, or taxation of any real or personal property including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community or any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing or regulation thereof. (1963, ch. 58, § 3, p. 224.)

Petitioner continues on page 9:

The Tribe never petitioned the District Court for full party status.

Thus, the Petitioner attempts to blur the Tribe's status as a party in this case and bolster its argument that with the United States voluntarily dismissing its appeal, the Tribe's right of appeal fell also.

The Appeals Court dealt with this contention as follows:

The cases cited by the State involve actions brought by the United States **on behalf** of an Indian Tribe. In this case, however, the United States did not institute suit on the Tribe's behalf. The Tribe appeals as a defendant/appellant in Case No. 80-3013, following the District Court's granting of its motion to intervene. Here, the United States was a plaintiff/appellant in Case No. 80-3014, which was consolidated for trial with the former case. . . . Appendix, pages 18 - 19.

The Excerpt of Record on file with the court of appeals verifies the appeals court's understanding. The Tribe intervened only in the Declaratory Judgment Action brought by the state in Case No. 80-3013. It did not intervene in the case brought by the United States. The district court granted the Tribe's motion to intervene and later its right to move for summary judgment in that case. (District Court No. 1-76-231, Appellate Court No. 80-3013).

**PETITIONER MISINTERPRETS DECISION
OF COURT REGARDING OWNERSHIP
OF REVERSIONARY RIGHTS**

The attack by petitioners on the Ninth Circuit's decision is made in a series of gratuitous statements with inadequate citation of authority or reason. Petitioner

simply says that, "The Ninth Circuit's conclusion that the Heyburn Act of 1908 did not extinguish Tribal title is wrong.", citing *U.S. v. Santa Fe Railroad*, 314 U.S. 339 (1941), which is inapplicable. The writer, in answering Petitioner, can do no better than direct the Court to that part of the decision dealing with the beneficial interest in the rights of reversion which were retained by the Tribe. That portion of the decision is on pages 7 through 18 of Petitioner's Appendix. This in turn shortened and paraphrased the relevant section of appellee's (the Tribe's) brief on appeal. It would serve no purpose to repeat that brief at length, especially when the legal argument is so well covered in the cited portion of the ninth circuit decision.

The court stated that the threshold question in the case was whether the Act of 1908 which authorized the conveyance to Idaho for the park created or preserved a beneficial interest in the Tribe which it could assert in this litigation.

The court noted that the question of whether title to Indian land has been extinguished is separate from the question of disestablishment. Appendix, p. 6 and p. 10. The court correctly stated that the test for extinguishment was stricter in that the state had the burden of showing clear Congressional intent to extinguish the Tribe's beneficial interest in the Heyburn lands. Appendix, p. 8.

The court found that the 1906 Act did create a beneficial interest in the unallotted lands of the reservation. Appendix, p. 8. The court then looked to the 1908 Act to see if the 1908 Act extinguished the Tribe's beneficial interest in the Heyburn Park lands. The court did so by looking to the face of the Act, its legislative history and surrounding circumstances to see if clear congressional intent to extinguish was present.

The appeals court pointed out how the Act of 1908 was lacking in any words of other language "which the Courts have found to be 'explicit' language of fee title termination." Appendix, p. 10. The court concluded that,

It cannot be said, therefore, that the face of the Act indicates clear congressional intent to extinguish the Tribe's beneficial interest. Appendix, p. 12.

The court then discussed the legislative history (beginning on page 12) and found that history "at best, to be equivocal," and that it certainly did not "show a clear congressional intent to make a sale of all withdrawn lands for a sum certain representing the appraised value of the lands" as found by the trial court.

It turned then to the surrounding circumstances, (page 15 of the Appendix) and discussed them and the law concerning them. It failed to find anything in the surrounding circumstances to verify that Congress intended to extinguish the Tribal interests in the withdrawn lands. It concluded:

Therefore, we hold that the State has not established clear congressional intent in the Act of 1908 to extinguish the Tribe's beneficial interest as created by the Act of 1906. Accordingly, the Act of 1908 preserved the Tribe's beneficial interest and correspondingly its right to participate in this litigation. Appendix, p. 18.

RELIANCE ON ASH SHEEP COMPANY V. UNITED STATES IS NOT MISPLACED

The Petitioner states on page 11 of its Petition,

The Ninth Circuit relied on authority derived from *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), to hold that neither boundary diminishment nor title

extinguishment necessarily severed the trust relationship as to Indian lands. However, this Court has never extended *Ash Sheep* so far.

The Ninth Circuit first of all decided in this case that there was no boundary diminishment or extinguishment of the Tribe's beneficial interest. Thus the above statement seems peculiar. Secondly, the Ninth Circuit cited *Ash Sheep* on the more limited basis than that claimed by the State. (see Appendix, p. 8.)

The language in the Act concerning the Crow reservation cited in *Ash Sheep*, was almost identical to that in the Coeur d' Alene Act of 1906 and was interpreted by this Court as explained by the Ninth Circuit. This is quite significant because the Act in *Ash Sheep* was the result of a cession agreement by the Tribe which "ceded, granted and relinquished" to the United States all of their "right, title and interest" (page 164). There was no cession agreement by the Coeur d' Alene Tribe agreeing either to the allotment-Homestead Act of 1906 or the Heyburn Act of 1908.

VOLUNTARY DISMISSAL BY THE UNITED STATES DID NOT PRECLUDE TRIBE FROM APPEALING THIS MATTER

This part of the petition, beginning on page 11, is adequately and conclusively answered by the Ninth Circuit in the portion of its decision entitled, UNITED STATES VOLUNTARY DISMISSAL, Appendix, p. 18.

The court outlined the right of the Tribe to intervene by reason of 28 USC § 1362 which was specifically enacted to cover situations of this kind where the Government, as quoted by the Ninth Circuit in the legislative history of that act, "for some reason does not want to prosecute the case on behalf of the Tribe."

The court pointed out:

In this case, the United States did not institute suit on the Tribe's behalf. The Tribe appeals as a defendant/

appellant in Case No. 80-3013, following the District Court's granting of its motion to intervene. Here the United States was plaintiff/appellant in Case No. 80-3014, which was consolidated for trial with the former case . . . Appendix, p. 18.

The court continued (page 19).

. . . the United States has not acted exclusively for the Tribe at any time during this litigation. In fact, the United States has not opposed the Tribe's right to appeal the District Court's decision.

All of the cases cited by petitioner as authority for the proposition that Tribes are bound by the actions of their federal trustee are cases brought by the United States for the Tribes in which the Tribes were not parties. One of the primary reasons for the enactment of 28 USC 1362 was the fact that Tribes were being bound, *res judicata*, by the various actions brought in their behalf by the United States and were not being allowed to intervene and participate in those cases in their own interests.

A typical case is the case of *United States v. Truckee Carson Irrigation District*, 649 F2d 1286 (1981) which held that the Tribe was bound.

These cases are not applicable to the situation present in this case where the Tribe has intervened and is litigating its property rights in the Heyburn lands.

CONCLUSION

For the forgoing reasons, the Petition for a Writ of Ceterari should be denied.

Respectfully Submitted,

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